SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners,*

v.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners,*

v.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PREFACE

This brief is filed by Respondents CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, pursuant to Rule 24 (1), United States Supreme Court Rules, in opposition to petitioners' Petition for Writ of Certiorari seeking review of an Order of the Supreme Court of the State of Florida denying two petitions for writs of certiorari for lack of jurisdiction.

The parties will be referred to as they stand before this Court or as follows:

CITY OF FORT LAUDERDALE and LEO RICHARD PAULIN	Respondents Defendants Appellees
JAMES CHARLES PAYNE and WALTER PAYNE	Petitioners Plaintiffs Appellants

The following symbols will be used:

AR	Appendix of Respondents
AP	Appendix of Petitioners

All emphasis is that of respondents, unless otherwise indicated.

OPINIONS BELOW

The opinions of the courts below directly preceding the Petition in this case are as follows:

1. Final Judgment pursuant to jury verdict dated February 25, 1972, unreported (AP. 79).
2. Opinion of the District Court of Appeal of Florida, Fourth District, affirmance per curiam, unreported (AP. 90).
3. (a) Order of the Supreme Court of Florida dated February 25, 1974, denying petitions for writs of certiorari for lack of jurisdiction, unreported (AP. 1-2).

   (b) Order of the Supreme Court of Florida dated March 19, 1974, dismissing appeal, unreported (AR. 1)

QUESTIONS PRESENTED *

I.

WHETHER PRIOR TO JULY 1, 1973, SECTION 40.01 (1), FLORIDA STATUTES, QUALIFICATIONS AND DISQUALIFICATIONS OF JURORS, WAS IN CONFLICT WITH THE TWENTY-SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

II.

WHETHER THE EXCLUSION OF PERSONS EIGHTEEN, NINETEEN AND TWENTY YEARS OF AGE FROM JURY VENIRES AND THE REQUIRING OF INDIVIDUALS OVER THE AGE OF SIXTY-FIVE TO WAIVE A PERSONAL EXEMPTION FROM HAVING TO SERVE ON JURIES WAS IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

This case arose over a vehicular collision on February 11, 1971, in which the minor plaintiff sustained injuries. In their complaint the plaintiffs alleged that the minor plaintiff's injuries were the result of the negligence of the individual defendant, Officer PAULIN, and that the Defendant CITY OF FORT LAUDERDALE was liable under the theory of respondeat superior. The defendants answered that the collision was due to the minor plaintiff's own negligence.

Prior to the jury voir dire examination at trial on February 7, 1972, counsel for plaintiffs objected to the entire jury venire, due to the exclusion of eighteen, nineteen and twenty-year olds. Testimony was taken to determine exactly how jury lists were prepared in Broward County, Florida (AP. 4-34).

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* For clarity, respondents have reworded the Questions Presented.

During this process the trial judge, The Honorable STEPHEN R. BOOHER, telephoned the Broward County Supervisor of Elections, Jane C. Carroll. She advised him that lists were prepared from registered voters between the ages of twenty-one and sixty-five. However, she stated that individuals over sixty-five could serve if they simply requested to be included on the jury lists (AP. 22).

The Honorable JOHN H. MOORE, III, also a Judge in said Circuit, was present at this hearing and he informed the Court that the 1970 Session of the Florida Legislature had removed the personal exemption for individuals over sixty-five by Chapter 70-138, Laws of Florida (AP. 24).

At this point, after twenty-five pages of argument and testimony, counsel for plaintiffs amended his challenge to the jury venire to include the "exclusion" of those over sixty-five years of age as well as those under twenty-one years of age.

The trial judge determined that there was no constitutional taint to this jury venire and found that there was no systematic exclusion of those over sixty-five years of age as a matter of law (AP. 31).

At the conclusion of this hearing, voir dire was held. During the process of selecting the jury, Mr. Murray Nathan was called as a prospective juror. Upon examination by the Court, he testified that he was seventy years of age (AP. 42). He was obviously in the jury venire to have been called as a prospective juror for this case.

The cause then proceeded to trial with the jury delivering a verdict on February 11, 1972, exonerating

both defendants. The final judgment was entered pursuant to that verdict (AP. 79).

The plaintiffs filed their Motion for New Trial alleging fault with the jury verdict, failure to give certain jury instructions, denial of rebuttal and the makeup of the jury venire. A full hearing was held with testimony being taken (AP. 35-77).

The motion was denied and the plaintiffs took an appeal to the Florida Fourth District Court of Appeal (AP. 82). After that Court considered the briefs of law and heard oral argument, the final judgment was affirmed per curiam without opinion (AP. 90). Petition for Rehearing was then filed and subsequently denied.

The plaintiffs then sought review of the Fourth District Court of Appeal's order through the Florida Supreme Court, pursuant to Florida Appellate Rule 4.5 (c)(6) and Article 5, Section 3 (b) (3), Constitution of the State of Florida by filing two Petitions for Writs of Certiorari.

In the first Petition (AP. 92), plaintiffs alleged that the final judgment, as affirmed, was in conflict with a letter of Chief Justice Vassar B. Carlton of the Florida Supreme Court to the Honorable John G. Ferris, Chief Judge of the Seventeenth Judicial Circuit, in and for Broward County, Florida, said letter being dated July 10, 1973. This letter stated that due to the Florida Legislature's enactment of Chapter 73-21, Laws of Florida, (AR. 2) jury venires should now include eighteen, nineteen and twenty-year-old individuals who had become adults by law on July 1, 1973—a year and a half after this trial.

The Second Petition for Writ of Certiorari (A. 97) stated that the plaintiffs felt that the per curiam affirmance somehow effected a class of Florida constitutional officers: Supervisors of Elections.

By Order dated February 25, 1974, the Supreme Court of Florida entered an Order stating that it did not have jurisdiction to issue a Writ of Certiorari to review the Order of the Fourth District Court of Appeal.

Plaintiffs also sought to bring a direct appeal to the Florida Supreme Court from the Order of the Fourth District Court of Appeal. This appeal was based on the same grounds as the Petition for Writ of Certiorari before this Court. Defendants moved to have the appeal dismissed as frivolous. Upon consideration of this motion, the appeal was dismissed (AR. 1).

The plaintiffs have not asked this Court to review this Order. They have, instead, only asked that the Order of the Florida Supreme Court holding that it did not have jurisdiction to grant Petitions for Writs of Certiorari be reviewed.

ARGUMENT

I.

Prior to July 1, 1973, Section 40.01 (1), Florida Statutes, Qualifications and Disqualifications of Jurors, Was Not in Conflict with the Twenty-Sixth Amendment of the United States Constitution.

By bringing this Petition for Writ of Certiorari, the petitioners have used an improper method of challenging the constitutional validity of Section 40.01 (1), Florida Statutes, as it existed prior to July 1, 1973.

The Florida Supreme Court, in dismissing petitioners' appeal, in effect upheld the constitutional validity of that statute. Where the validity of a state statute is challenged in the state courts and upheld, the vehicle for review is appeal to this Court, not a petition for writ of certiorari:

> "28 USC § 1257. State courts; appeal; certiorari
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Between the time of the adoption of the Twenty-Sixth Amendment to the United States Constitution and the Florida Legislature extending the privileges of majority to those individuals between the ages of eighteen and twenty, the Florida Supreme Court had twice considered this very point of law in light of the decisions of this Court. On both occasions the Florida Supreme Court upheld the validity of the requirement that persons must be over the age of twenty-one years to serve on juries.

The first challenge to this statute was in the case of *State* v. *Silva*, 259 So. 2d 153 (Fla., 1972), wherein the Florida Supreme Court held that the Twenty-Sixth Amendment said nothing about the jury make-up and that the individual states were free to require jurors to be at a minimum age of twenty-one to serve, at pages 161 and 162:

> "We turn to the second question, which is answered in the affirmative. The Twenty-Sixth Amendment to the United States Constitution pro-

vides that the *right* of citizens eighteen years of age or over *to vote* shall not be denied or abridged by the United States or by any state on account of age. This amendment has no bearing on eligibility of persons for jury service.

Fla. Stat. § 40.01(1), F.S.A., provides that jurors shall be taken from the male and female persons *over the age of twenty-one years,* who are citizens of the State and who have resided in the State for one year and in their respective counties for six months, and who are fully qualified electors of their respective county. *Since the Twenty-Sixth Amendment to the United States Constitution says nothing about jury service, the State is free to require that jurors be over twenty-one years of age, as each state has the power to establish the qualifications for jurors to serve in its courts.* 47 Am. Jur.2d, Jury, § 96, p. 707.

The following appears in 47 Am.Jur.2d, Jury, § 102, p. 711:

> "The right to vote and the privilege and qualification to serve as a juror are not correlative or necessarily coexistent. Thus, while electors and jurors may have some requirements in common, a person may be a qualified elector and yet not be a qualified juror, and vice versa."

50 C.J.S. Juries § 134, pp. 861-862, contains the following:

> "In the absence of any constitutional provision on the subject, and as long as the essential requisites of trial by jury are preserved, the qualifications of jurors are matters of legislative control, and, in the exercise of its control, the legislature may restrict, abridge, deny or enlarge the right and duty of jury service."

* * *

In *Carter* v. *Jury Commission of Greene County,* 396 U.S. 320, 90 S.Ct. 518, 24 L. Ed. 549 (1970),

quoted extensively in our discussion of the third question, *the Court recognized the right of the State to confine the jury selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.* See also Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961).

Approximately one and a half years after the trial in this case, the Florida Legislature extended the privileges of adulthood to eighteen, nineteen and twenty year olds. This is found at Chapter 73-21, Laws of Florida, Section 1.01 (14), *F.S.*, and this in effect amended the minimum age for jury service to eighteen rather than twenty-one.

Throughout the state there was some lag in placing these individuals on jury venires. In the case of *Reed* v. *State,* 292 So. 2d 7 (Fla., 1974), this lag was challenged in Dade County, Florida. There was also a challenge as well on the constitutionality of the statute prior to July 1, 1973. The Florida Supreme Court again upheld the validity of the statute in light of the decisions of this Court at pages 9 and 10:

> [1] As was carefully and extensively set forth in State v. Silva, *supra,* the tests for voting eligibility and jury duty eligibility are not necessarily identical, and it is within the control of the Legislature to determine juror qualifications in the absence of any constitutional mandate. We are not confronted with the 1973 Act of the Legislature [Ch. 73-21, Laws of Florida] granting adult rights to 18-year-old citizens. Under this law, the 18-year-old citizen is now eligible for jury service.
>
> *The right of the State to determine the quality of juries in the State courts has always been recog-*

nized by the United States Supreme Court. In Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952), the Supreme Court considered a North Carolina statute which provided that the selection of jurors should be on the basis of property tax lists. In upholding the statute, the Supreme Court said:

> "States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.
>
> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality." (344 U.S. pp. 473, 474, 73 S.Ct. p. 416, 97 L.Ed. pp. 497-498)

A similar pronouncement was made in Carter v. Green County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), where the Court upheld an Alabama statute governing jury selection by commissioners. The Supreme Court in its opinion said:

> "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possess-

> ing good intelligence, sound judgment, and fair character. 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.'
>
> ". . . Nearly every State requires that its jurors be citizens of the United States, residents of the locality, of a specified minimum age, and able to understand English. Many of the States require that jurors be of 'good character' or the like; some, that they be 'intelligent' or 'well informed.'" (396 U.S. pp. 332, 333, 90 S.Ct. p. 525, 24 L.Ed.2d pp. 559-560)

This Court has consistently held that the states have the right to determine the qualifications of juries to be used within their state courts. See *Brown* v. *Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952) and *Carter* v. *Green County,* 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970).

The Petition for Writ of Certiorari should be denied.

II.

The Exclusion of Persons Eighteen, Nineteen and Twenty Years of Age from Jury Venires and the Requiring of Individuals Over the Age of Sixty-Five Waiving Personal Exemption Is Not in Conflict with the Fourteenth Amendment to the United States Constitution.

Another challenge made regarding this jury panel by plaintiffs was regarding the exclusion of registered voters over the age of sixty-five. Circuit Judge Moore had pointed out that § 40.08, *F.S.,* had been amended by Chapter 70-138, Laws of Florida, to exempt attorneys only. At the hearing (AP. 4-34) prior to trial, it

was stipulated by counsel for all parties that Jane C. Carroll, the Supervisor of Elections in Broward County, would say she compiled lists from registered voters between the ages of twenty-one and sixty-five years. Obviously, from this testimony Ms. Carroll was not aware that § 40.08, *F.S.,* had been amended.

Prior to July 1, 1970, § 40.08, *F.S.,* had specifically exempted those over the age of sixty-five, and a number of specific professions such as millers, ferry boatmen, train dispatchers, etc. Exemption from jury service in Florida was *not disqualification* but merely a personal privilege of those individuals which they could avail themselves of if they so chose. Such exemption could not be used to challenge a prospective juror for cause. See *Crosby* v. *State,* 90 Fla. 381, 106 So. 741 (Fla., 1926), which held that exemption offered the aged in old § 40.08, *F.S.,* was a privilege and did not have the effect of disqualifying such person from jury service.

Due to the ever-present possibility of having an "insufficient Grand Jury list and a petit jury venire that would soon be exhausted" due to high percentages of exempt persons, it soon became the practice of the various Supervisors of Elections to delete from prospective jury lists the names of all voters who were exempt under § 40.08, *F.S.* This practice was challenged in the Florida Supreme Court in *Thomas* v. *State,* 223 So. 2d 318 (Fla., 1969). Justice Roberts, speaking for a unanimous court, wrote that this practice was perfectly permissible "as a matter of practical necessity".

Because individuals who were exempt from jury service were not disqualified, a procedure had to be developed for those who wished to waive their personal privilege of not having to sit on juries. Prior to 1967 a per-

fect procedure existed in § 40.01 (1), *F.S.*, which exempted all women and required those women who wished to serve to register with the Clerk of the Circuit Court:

> "40.01 Qualifications and disqualifications of jurors.—
>
> (1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year, and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, *however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.*"

This courtesy was extended as a matter of local custom to exempt persons who wished to waive their exemption:

> "THE COURT: Let's make it clear here, also, that all people over 65 were not excluded. Those who requested the ability to serve were included.
>
> MR. KIRSCH: By whom?
>
> THE COURT: By Mrs. Carroll. The rule applied prior to '70, the '70 amendment, and which she is applying now is that they are not put on the panel unless they requested it. If they do, then they go on the panel." (AP. 33)

The exact procedure used in the instant case for persons over sixty-five years of age was upheld when used for women by the Florida Supreme Court and this Court in *Hoyt* v. *State,* 119 So. 2d 691 (Fla., 1959), and *Hoyt* v. *State of Florida,* 368 U.S. 57, 82 S.Ct. 159,

7 L.Ed.2d 118. In that case, the Florida and the United States Supreme Courts held that the procedure of requiring women to register for jury service to waive their privilege not to serve on juries both constitutional as applied to all women, and constitutional as applied to a white female criminal defendant in Hillsborough County, Florida.

The Courts went on further to specifically state that the requirement that women register for jury service was *in no way an arbitrary and systematic exclusion* of those eligible for jury service. It must be noted that even under old § 40.01 (1) women were never ineligible for jury service, but merely privileged not to serve, as were individuals over sixty-five under the old § 40.08. The requirement that they register to waive their privilege before being placed on jury venires was specifically held not to be a systematic exclusion.

The issue of whether the exclusion of any age group from a jury venire effects the constitutional rights of the litigants has been considered a number of times with the consistent holding that it does not infringe upon said rights.

The Florida Supreme Court recently considered this question in light of the opinions of this Court in the case of *Reed* v. *State, supra.* In that case the Florida Supreme Court correctly held that there was no constitutional taint when young adults were excluded and those over the age of sixty-five were treated differently than other potential jurymen.

The U. S. Court of Appeals, Fifth Circuit, has also considered this question in a case arising out of Florida: *United States* v. *Kuhn,* 114 F.2d 179 (5th Cir.,

1971), wherein it was held that there was no constitutional taint to the jury even though young adults were excluded because jury lists were only made up once every five years.

The U. S. Court of Appeals, First Circuit, in the case of *King* v. *United States,* 346 F.2d 123 (1st Cir., 1965), held that there was no constitutional taint in a jury which excluded persons between the ages of 21 and 25 and over the age of 70.

The petition for writ of certiorari should be denied.

CONCLUSION

Based on the authorities and arguments cited herein, it is respectfully suggested that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1974

TUESDAY, MARCH 19, 1974

CASE NO. 44,448

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

72-514

JAMES CHARLES PAYNE, ETC., ET AL., *Appellants,*

v.

CITY OF FORT LAUDERDALE, ET AL., *Appellees.*

On consideration of the Motion for Dismissal filed March 4, 1974, the Order of February 25, 1974 is vacated and the cause is hereby dismissed.

A TRUE COPY
TEST:
SID J. WHITE
Clerk Supreme Court.

By: /s/ KAY O. GENT
Deputy Clerk

CC: Hon. E. J. Comiskey, Clerk
Hon. Clyde Heath, Clerk
Hon. Stephen R. Booher, Judge
Fleming, O'Bryan & Fleming
(Hon. Frank E. Maloney, Jr.)
Kirsch, Druck & Mills
(Hon. Ben J. Weaver)

Ch. 73-21

1973 REGULAR SESSION

MINORS—DISABILITIES OF NONAGE

CHAPTER 73-21

SENATE BILL NO. 152

An Act relating to the rights of majority; creating section 1.01(14), Florida Statutes; providing a definition of minor; providing that the disabilities of nonage shall be removed for all persons of eighteen years of age or older; providing that this act shall not affect court-ordered support; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (14) of section 1.01, Florida Statutes, is created to read:

1.01 Definitions

In construing these statutes and each and every word, phrase or part hereof, where the context will permit:

(14) The word "minor" includes any person who has not attained the age of 18 years.

Section 2.

The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older and they shall enjoy and suffer the rights, privileges and obligations of all persons 21 years of age or older except as otherwise excluded by the Constitution of the State of Florida immediately preceding the effective date of this act. Provided, however, this act shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years; and provided further that any crippled child as defined in chapter 391, Florida Statutes, shall receive benefits under the provisions of said chapter

until age 21, the provisions of this act to the contrary notwithstanding.

Section 3.

This act shall operate prospectively and not retrospectively and shall not affect the rights and obligations existing prior to the effective date of this act.

Section 4.

Any law inconsistent herewith is hereby repealed to the extent of such inconsistency. In editing the manuscript for the next revision of the Florida Statutes, the statutory revision and indexing service is hereby directed to conform existing statutes to the provisions of this act.

Section 5.

In the event that any provision or application of this act is held to be invalid, it is the legislative intent that the other provisions and applications hereof shall not be thereby affected.

Section 6. This act shall take effect July 1, 1973.

Approved by the Governor May 9, 1973.

Filed in Office Secretary of State May 9, 1973.